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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

B5

DATE:

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

**FEB 09 2012**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition on his own behalf, the petitioner was the chief marketing officer for [REDACTED]

[REDACTED]. He has since become that company's chief operating officer.

The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and numerous supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation (NYSDOT)*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 20, 2010. Several witness letters accompanied the petition, the most comprehensive of which bears the signature of [REDACTED] strategy officer at [REDACTED]. That letter reads, in part:

I met [the petitioner] when he was a graduate student at the highly regarded Eller College of Management at the University of Arizona. At that time, [the petitioner] stood out among his peers as a natural leader and creative thinker. . . . [The petitioner] worked as a Senior Advisor at Strategic Growth Advisors from 2004 to earlier this year (2010). . . .

Over the course of his graduate and consulting career, [the petitioner] has applied his unique combination of education and expertise in a focused manner – to firmly grow small businesses, promote the ownership and success of woman and minority-owned businesses as well as improve the efficiency and operations of non-profit organizations. . . .

[The petitioner's] contributions [to education] include both his development of a novel curriculum and mini-course at Arizona State University as well as contributions to improve the efficiency of the Tucson School District. . . .

[The petitioner's] contributions in the field of education include....[ellipsis in original]

- i. The creation of a new, more effective method of teaching materials which increases the student's ability to use critical thinking skills to solve problems; and
- ii. The development of a new course in statistical thinking curricula. Both enhance the body of literature on education and are positive contributions to this field.

As discussed above, [the petitioner's] interest in the field of education is not limited to the classroom, but also to developing more efficient logistical solutions that enhance school districts['] ability to efficiently allocate resources in the students' best interest.

To provide more examples of the petitioner's work, [REDACTED] quoted from several other witness letters, to be discussed below.

[REDACTED]  
(New Jersey) State University, was previously an associate dean at the University of Arizona while the petitioner was a student there. [REDACTED] stated:

[The petitioner] published and presented a significant paper entitled [REDACTED] at the Quality and Productivity Research Conference (June 2002). His work involved promoting the design of a course on Statistical Thinking. His proposal was well-regarded, and in fact [the petitioner] was asked to teach a mini-course built on this research. Specifically, [the

petitioner] proposed that a systems theory approach to teaching is a more effective method than traditional methods for teaching the topic. Systems teaching creates a collaborative environment rather than an environment characterized by hierarchy. . . . As a result, [students] internalize and retain the content, because they have learned through experience rather than by rote. . . .

I am familiar with [the petitioner's] research on behalf of the Tucson Unified School District, where he co-authored "Best Practices for TUSD: A Comparative Study of Nine Arizona School Districts." . . . In his report, [the petitioner] identified a number of tangible ways to make transportation more efficient and cost-effective for this major metropolitan school district. The district went ahead and implemented some of [the petitioner's] recommendations, to great success.

In other early work, [the petitioner] committed to researching exports in Arizona to promote a more integrated and efficient export strategy for southern Arizona.

Over the years, [the petitioner] has applied his systems thinking approach to business management to mentor small business owners particularly minority small business owners and women entrepreneurs. . . . I am not privy to the details but I know that [the petitioner] has maintained a good reputation with the business community.

(Emphasis in original.) Like many witnesses, [REDACTED] cited no first-hand evidence to support the claims of fact in his letter.

Career coach [REDACTED] stated:

I have known [the petitioner] since 2004, when he was involved in an important graduate research project at the University of Arizona's Eller College of Management. [The petitioner] volunteered his time in connection with this project to serve as a co-author of "Best Practices for TUSD: a Comparative Study of Nine Arizona School Districts." At the time of this report, I was the Associate Director for Internship Development at the University of Arizona Eller College of Management, and I met regularly with [the petitioner] while he conducted his research. . . .

The purpose of [the petitioner's] research project and related report was to . . . look[] for ways to reduce spending and increase revenue by making improvements to the transportation system. . . . His report provided a roadmap of best practices to address common problems within the TUSD. . . .

I am pleased to report that since [the petitioner] presented his recommendations and report in 2004, many of the best practices have been implemented by the Transportation Department.

The only recommendations that [REDACTED] identified as adopted were that the district switch to hybrid vehicles, and sell advertising space on school buses. The record contains nothing from the TUSD to confirm (1) adoption of the recommendations; (2) that TUSD would not have considered these options except for the petitioner's recommendations; or (3) the accuracy of the petitioner's projections of cost savings.

[REDACTED], now state director for risk management at [REDACTED] operations in Rhode Island, was previously a managing director at the Commission on Accreditation of Rehabilitation Facilities (CARF) while the petitioner was a summer intern there as a staffing and process improvement analyst. [REDACTED] stated:

While at CARF (albeit only for a short time), [the petitioner] specialized in business process mapping and process improvement. . . . [The petitioner's] role at CARF was to map out CARF's internal processes . . . and to suggest ways to improve the processes used by the organization. He also helped CARF to know if root cause of the issues being faced by CARF were due to a manpower shortage or due to inefficient processes. He provided a valuable internal report to me, which was used by me and senior management regarding the hiring of new resource specialists.

. . . Since his work at CARF, [the petitioner] completed his MBA and did a stint at the International Trade Development Corporation (now known as the Innovative Technologies Development Center). . . . He focused on the relationships between a whole network of businesses in Southern Arizona, including analysis on technological and export capabilities within the state.

More recently, at Strategic Growth Advisors, [the petitioner] has utilized his highly specialized skills in helping to transform small to midsize companies into regional and industry leaders, but perhaps equally impressive is his continued interest in the non-profit sector where often high-quality business consulting and strategic thinking is not available. Further, [the petitioner's] current work with minority-owned and women-owned businesses provides more recognition of his value to his clients and to broader public interests.

The AAO notes that, by the time [REDACTED] wrote his letter in April 2010, the petitioner had already left Strategic Growth Advisors and was working for a moving company. [REDACTED] does not appear to have been aware of this change in the petitioner's employment.

[REDACTED]  
Tucson, Arizona, stated:

From May 2004 to November 2004, [the petitioner] was a Project Manager intern at ITDC. During this period, he presented to me the idea of "coopetition" for businesses. It is a novel concept for companies to improve their operational

excellence through strategic alliance, instead of engaging in competition. For example, Company A might have a hardware product and company B might have a software product and they could combine them to create a complete product thereby achieving a faster time to market and also saving tremendously on development costs.

I found the idea of “coopetition” intriguing and consistent with our mission at ITDC, and [the petitioner] and I came up with an ITDC project for business coopetition, with the goal to increase technology exports from Southern Arizona. . . .

**As a result of [the petitioner’s] work and contribution, ITDC was able to identify and understand businesses in the Southern Arizona region with unique technologies to engage in “coopetition” and increase technology exports. Although the specific project was not fully implemented at ITDC due to the conclusion of [the petitioner’s] position/internship, I was very impressed with [the petitioner’s] exceptional ability to combine his analytical, problem-solving skills with his knowledge of business development.**

(Emphasis in original.) [REDACTED], having stated that the “project was not fully implemented,” did not specify the extent (if any) to which ITDC partially implemented the project or identify any functioning examples of “coopetition” arising from the petitioner’s work.

[REDACTED]  
Research, Niskayuna, New York, attempted to recruit the petitioner, but the petitioner declined the offer in order to continue his graduate studies at the University of Arizona. [REDACTED] praised the petitioner’s work for the Tucson Unified School Board and for ITDC, and asserted that the petitioner “has demonstrated his ability to incorporate his analytical expertise into his method for expanding and increasing the efficiency of small and midsize companies.” [REDACTED] also asserted that the petitioner has helped “small companies towards accomplishing their goal of developing into national and international organizations. Some of these organizations include the *Tucson YMCA boards* and *Arizona Public Media*” (emphasis in original). Continuing a pervasive pattern in the record, the record contains no first-hand evidentiary support for [REDACTED] claims.

[REDACTED] stated:

[The petitioner] is a recognized expert in marketing and systems thinking, who has made a concerted and consistent effort to promote small business ownership, minority-business ownership, and women-owned businesses over the last several years. He has been involved in mentoring business owners and making presentations of expertise. This work has been in addition to his well-regarded career as a professional consultant.

Because of [the petitioner’s] proven expertise in the field of Systems Thinking as applied to business and marketing, we at [REDACTED] have partnered with him to serve

as a mentor and advisor to business owners that participate in our training. In this way, he has been an expert capable of judging the business models and strategies of our members. . . . [The petitioner] is an expert at evaluating and increasing businesses' success based on Systems Thinking analysis.

One of the initial witnesses is a former client of the petitioner. [REDACTED] president and [REDACTED] "a private company in the business [REDACTED] based in Henderson, Nevada, stated:

US Advanced Medical Research retained [the petitioner] through [REDACTED] [REDACTED] for strategic planning and marketing analysis to enhance the overall performance of our company. [The petitioner] . . . worked closely with me and was a valuable resource.

[The petitioner] conducted a detailed and comprehensive assessment of my company in terms of structure, people, process, technology, customer base and competition. He developed a growth roadmap based on this assessment which included a new marketing plan, marketing processes and marketing platform. Specifically, [the petitioner] presented a growing opportunity for my company with a comprehensive systems approach of growth that connects all aspects of my company into a single system for the purpose of supporting our lifestyle, our workstyle, and meeting the needs of the right demographic of customers.

Using a Systems Thinking approach . . . , [the petitioner] helped us to ask *why we do things in a certain manner* and determine the advantages and disadvantages of our approaches. Part of this process was visualizing company processes through the development of process maps which were included in the process handbook developed by [the petitioner] for our company.

. . . As a result of [the petitioner's] creative and systematic approach, monthly production reported from our top sales person increased by a range of \$30,000 to \$80,000 per month!

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately

responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

Many of the witnesses made claims of fact regarding projects in which they themselves did not participate, such as [REDACTED] assertion that the petitioner helped to transform [REDACTED] [REDACTED] into a "national and international organization" and [REDACTED] claim that the Tucson Unified School District implemented the petitioner's recommendations. Such claims lack both corroboration and detail.

Several witnesses attested to the petitioner's skills as an advisor to businesses and nonprofit organizations. None of the witnesses indicated how the petitioner continues to use those skills at [REDACTED]. Indeed, the witnesses did not even acknowledge his employment there, even though most of them wrote their letters about two months after the petitioner had begun working for the moving company. It is, therefore, not clear how the witnesses' praise of the petitioner ties in to his most recent work for Horizon.

The petitioner himself, on Form ETA 750 Part B, Statement of Qualifications of Alien, described his current duties as chief marketing officer at [REDACTED] in this way: "Conduct marketing assessments, create and execute comprehensive marketing plans, and lead the improvement of [the] company's marketing channels." The petitioner did not explain how this work furthers the interests of anyone other than his current employer. This is a significant consideration, because the national interest waiver requires prospective benefit to the United States; it is not a reward for past work. For this same reason, the petitioner's research work as a student carries negligible weight in this proceeding without evidence that he has continued to engage in such research, or to implement the findings therefrom.

On June 17, 2010, the director issued a request for evidence, instructing the petitioner to "submit documentary evidence to establish that the benefits of [the petitioner's] proposed employment with Horizon Moving Systems, Inc., will be national in scope." The director also requested evidence of "a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director also instructed the petitioner not to re-submit previously submitted materials. Nevertheless, the majority of the petitioner's response consists of copies of several previously submitted exhibits.

In response to the notice, the petitioner discussed and quoted from earlier witness letters, even though those letters did not address his current work at Horizon. The petitioner also stated: "I provided the unique concept of 'coopetition' – a combination of 'cooperation' and 'competition.'"

The petitioner failed to establish that he coined the term or developed the concept. The AAO notes that a search for the word “coopetition” using the Google search engine, <http://www.google.com>, yields over 200,000 results, including a century-old reference.<sup>1</sup>

Regarding his current work, the petitioner stated:

I am currently a senior marketing officer at [REDACTED] the largest moving and storage company in Arizona, and the leading agent of [REDACTED] [REDACTED] is a leading national moving company, and the work of a moving company is national and international by nature. Prior to my work at [REDACTED] [REDACTED], I was a management consultant for small businesses and non-profits and governmental entities.

My work and accomplishments in the areas of systems thinking, business operations, and management consulting have had a national impact and are national in scope. . . . I believe that my contributions have contributed positively to the U.S. economy, including exports and government efficiency/energy efficiency. My current work contributes to positive impact on the U.S. military. . . .

I have recently joined [REDACTED], where I have used my experience with systems thinking, business operations, and management consulting to keep the company going forward and growing, and maintaining a positive relationship with key corporate and government clients, including the U.S. military. My work has been critical for Horizon to maintain a market share and preserve U.S. jobs.

My current work with Horizon has a national impact in part through our business partnership and contracts with the U.S. Air Force and other governmental agencies. Horizon has a long working history with such governmental agencies, and in my senior role, I have been able to provide services to help maintain and enhance our moving and storage services for the United States Air Force and beyond. Certainly, by providing efficient and quality moving services for our many government contracts, I have been able to positively impact a national priority, namely the easy of [sic] transition for committed military personnel and civilians in a time of war.

The petitioner did not explain how he “provid[es] . . . moving services” for government clients. His employer provides those services, but the petitioner’s responsibilities lie in marketing, rather than in actually providing moving or storage services.

Three new witness statements accompanied the petitioner’s response to the request for evidence. [REDACTED] in an affidavit, did not claim any personal

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<sup>1</sup>Kirke S. Pickett used the term in the advertising journal *Printers' Ink*, Vol. 74, No. 1, January 5, 1911, p. 79. An image of the publication is available at <http://books.google.com/books?id=FrEpAAAAYAAJ> (excerpt added to record January 25, 2012).

knowledge of the petitioner or his work. Rather, [REDACTED] knew of the petitioner as a result of being "well-acquainted with [REDACTED], the [REDACTED]s, [REDACTED] stated:

My experience with [REDACTED] includes his and his company's work with [REDACTED] while I was Wing Commander, as well as [REDACTED] leadership with [REDACTED] a civilian community support group for [REDACTED]

I can confirm that [REDACTED] has had a longstanding and positive business relationship with Davis Monthan Air Force Base, and that many members of the U.S. Air Force have received excellent treatment and service with Horizon. As you may already know, [REDACTED] is the largest moving company in Tucson and one of the largest agents of United Van Lines in the United States. . . . In addition to its work with [REDACTED] also works with critical defense contractors, [of] which there are many in Arizona.

[REDACTED] has weathered the worst part of the recession and maintained its service to the U.S. government. As part of its plan to build back up and grow, the company has retained the valuable services of [the petitioner] as a key advisor.

As our country fights two active wars in Iraq and Afghanistan, our military is stretched and military personnel are asked to move often and sometimes in difficult circumstances. Retaining a valuable business partner with stable financial standing like [REDACTED] is certainly something that is in our national interest.

Providing for jobs in Arizona and maintaining strong and efficient business relations with defense contractors is also consistent with various U.S. government policies.

[The petitioner's] work has been critical to [REDACTED] in the past several months, and I know that the company seeks to retain [the petitioner's] services in order to maintain its position and to grow. [The petitioner] brings a broad range of experience which can be utilized in maintaining and enhancing [REDACTED] service to the U.S. Air Force. It seems unfortunate that Horizon may lose [the petitioner] as a key employee just as the company has turned the corner out of the recession.

[REDACTED], above, essentially equated denial of the waiver with termination of the petitioner's employment at Horizon, but he did not demonstrate that Horizon has no other means of retaining the petitioner as an employee.

[REDACTED] the parent company of United Van Lines, stated:

Horizon has weathered the very tough 2008 and 2009 years and, through the hard work of [REDACTED] and his management team, has an active plan to maintain its longstanding success and remain a viable company for the coming years.

... [D]uring his short tenure with the organization, I understand [the petitioner] has provided valuable leadership and analysis as well as strategic thinking about how to maintain Horizon's current market position despite the current economic challenges in the United States.

... I can confirm that the services of [the petitioner], as [REDACTED] largest agents, play in an important role in what is clearly a national business. . . . We need our agents in a strong financial position with a well-conceived business plan particularly now in the current economy. We want our agents to be financially stable and maintain a strong workforce.

The record indicates that Horizon has been in business since 1924, and "weathered the very tough 2008 and 2009 years" before the petitioner began working there in February 2010. [REDACTED] did not explain why this established company's continued success now depends on the petitioner's efforts.

[REDACTED] stated:

I am the [REDACTED] an independent, nonprofit membership organization and think tank that identifies crucial issues facing Arizona. . . . In my role with the Arizona Town Hall, I am familiar with leading businessmen in Arizona, including [REDACTED] whose [REDACTED], is active in Arizona Town Hall and currently serves as the Board Chairman.

[REDACTED] retained [the petitioner] initially as a consultant and now as a full-time professional, relying extensively on [the petitioner's] background and experience with business operations, management consulting, and systems thinking. . . . [The petitioner] has highly specialized, specific past experience in systems thinking and analyzing an organization from top-to-bottom. . . .

Right now we need to protect our private sector employers and the jobs they offer and tax base they provide from their profits. Someone like [the petitioner] enhances the stability of his employer and brings extensive expertise that has been developed over years.

The three witnesses quoted above focused not on the petitioner, but on Horizon as a company. The witnesses offered little explanation as to why it is in the national interest that the petitioner, rather than a qualified United States worker, fill the chief marketing officer position at Horizon. The

assertion that the petitioner is well qualified for the position does not lead to the conclusion that it is therefore in the national interest for him, rather than another qualified worker, to fill that position. There exists no blanket waiver for top officers of established businesses, and the petitioner submitted no evidence to show that the petitioner is responsible for creating significant numbers of new jobs or preserving existing jobs that would otherwise have disappeared. Witnesses asserted that the petitioner's qualifications justify optimistic projections for Horizon's future growth, but speculation of this kind is not evidence of existing impact on his field.

The director denied the petition on October 5, 2010. In the denial notice, the director acknowledged the intrinsic merit of the petitioner's occupation, but found that the petitioner had not established its national scope or "a past history of achievement with some degree of influence on the field as a whole." The director concluded that the petitioner "is a competent, well-trained, creative marketing officer who appears well qualified for the work he proposes to do," but that "not every well-trained, competent, petitioner qualifies for a national interest waiver."

The petitioner, on appeal, disputes the finding that the petitioner's occupation lacks national scope. The "national scope" prong of the *NYSDOT* national interest test relates to the occupation rather than to any one individual in that occupation. In this light, the AAO acknowledges that a marketing executive for a large corporation can have national scope, particularly where federal government contracts are involved. The AAO will therefore withdraw this element of the director's findings. There remains the third prong of the *NYSDOT* national interest test, specific to the petitioner.

On appeal, counsel asserts that the director failed to consider several of the petitioner's evidentiary exhibits. For example, counsel states that the director ignored [REDACTED] affidavit "attesting to the petitioner's work and its relevance to U.S. military activities." That affidavit focused on Horizon's longstanding business relationship with a local Air Force base and its personnel. Whatever the merit of [REDACTED] assertions, it does not follow from those claims that Horizon's staffing decisions should be exempt from the statutory labor certification requirement. To demonstrate eligibility for the national interest waiver, it cannot suffice for the petitioner to show that he is qualified for a management position at a respected and successful company. The petitioner may well be Horizon's first choice for the position of chief marketing officer, but that does not show that it is in the national interest of the United States for Horizon to bypass the job offer requirement, including labor certification.

Similarly, counsel states that [REDACTED] discussed the petitioner's "critical role and contributions to Horizon." [REDACTED], however, described the petitioner's work for Horizon only in very vague terms, for instance praising the petitioner's "valuable leadership and analysis as well as strategic thinking." The petitioner had not submitted any first-hand, documentary evidence to quantify the effect that his work has, thus far, had on Horizon's ability to retain workers and serve its customers.

Counsel, on appeal, claims: "In *NYSDOT*, the petition failed in that case because the documentation did not establish the exceptional ability of the beneficiary." The initial appellate submission

includes a complete copy of the *NYSDOT* decision, but counsel nevertheless mischaracterized that decision. Exceptional ability was not a factor in *NYSDOT*:

Because, by statute, “exceptional ability” is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the “achievements and significant contributions” contemplated in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

*Id.* at 218-19. That same decision clearly indicated that, because the beneficiary of that petition qualified as a member of the professions holding an advanced degree, “[t]he issue of whether the beneficiary is also an alien of exceptional ability is moot.” *Id.* at 216.

Counsel contended that the petitioner’s witness letters “discuss specific ways [the petitioner] has helped to:

- Grow minority and women-owned businesses;
- Increase exports;
- Promote ‘green’ technologies;
- Grow small businesses;
- Enhance non-profit administration; and
- Improving education.

Counsel does not explain how the petitioner’s work at Horizon serves any of the above goals. The petitioner’s past work in those areas does not permanently create a legacy of entitlement for future employment-based immigration benefits. It is significant that, in the appellate brief, counsel relies on the petitioner’s current work at Horizon to meet the “national scope” prong of the *NYSDOT* test, but on the petitioner’s earlier work for previous employers to establish the impact of the petitioner’s work. The petitioner cannot partition his claim in this way, such that his intended future work satisfies some elements of the *NYSDOT* test while his very different past work satisfies the rest.

Much of the appeal duplicates earlier submissions, but the petitioner submits two new witness statements. [REDACTED], previously identified as the president of [REDACTED] Inc., signed a 15-page statement disputing the denial and reasserting the petitioner’s waiver claim. The AAO need not address [REDACTED] claims regarding the national scope of the petitioner’s work, because the AAO has already acknowledged that scope. The sole remaining issue in contention concerns the nature of the petitioner’s influence and impact on his field.

Significant portions of the new statement, attributed to [REDACTED], are identical to passages of the original statement signed by [REDACTED]. In effect, the new statement does little more than

repeat the original statement, punctuated with assertions that the exhibits and claims discussed therein refute the director's grounds for denial of the petition. Given the identically worded passages, it is not clear how much of this statement [REDACTED] (or [REDACTED] actually wrote. The new statement echoes counsel's strategy of focusing heavily on the petitioner's past work as a graduate student and for organizations that no longer employ him.

[REDACTED] was previously [REDACTED] director of transportation. His letter, submitted on appeal, marks the first statement of record by a past or present [REDACTED] official. [REDACTED] asserts that "most of [the petitioner's] best practiced [sic] ideas have been implemented by the [REDACTED]" [REDACTED] repeats figures and estimates from the petitioner's 2004 report, but provides only vague information about the effects of the petitioner's recommendations. For instance, [REDACTED] states that the petitioner "predicted that the [school bus] advertisements would generate about \$120,000 for the school," but did not state whether subsequent events have borne out that prediction. Indeed, [REDACTED] does not specifically state whether or not the district actually implemented the advertising plan. As another example, [REDACTED] states that the petitioner "pointed out that in the fiscal year 2002-2003, the [REDACTED] spent \$1,051.034 on gasoline," but he does not provide any figures to show a significant reduction in gasoline consumption in later years. [REDACTED] does not even claim that there was such a reduction – he says only that the petitioner made recommendations to that end.

The petitioner submits copies of quarterly payroll reports, showing that the petitioner had 160 employees in March 2010, rising to 181 employees in July 2010. A handwritten annotation states: "Petitioner has been helping to grow jobs." The record does not indicate how much of the company's growth was a result of the petitioner's initiatives rather than other factors. The AAO notes that, while the petitioner had 181 employees in July 2010, by September 2010 that figure had dropped to 169, a net increase of only nine employees. If the petitioner maintains that he is responsible for increases in employment figures, then he must also show how he is not responsible for the subsequent drop.

Also, the fragmentary evidence provided does not account for other factors, such as seasonal employment. If, for example, a moving company routinely hires college students during their summer vacations, then it would be logical to expect an increase during the summer months followed by a drop-off as those students returned to school. The payroll documents are consistent with that explanation, with no countervailing evidence to rule it out in favor of the alternative explanation that the petitioner has grown the company.

The witness statements in the record indicate that the petitioner's employers, clients and colleagues hold him in high regard, but the record contains no coherent national interest claim. The petitioner has essentially argued that his past work presented numerous benefits to the United States, and that his future work with Horizon will be beneficial for almost totally different reasons. USCIS does not dispute that the petitioner is well qualified for his position with a successful company, but this does not translate into an issue of national interest.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.